No. 1046

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

NICK GURVICH,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

# BRIEF FOR THE UNITED STATES OF AMERICA

JOHN J. BOYCE,
*United States Attorney for the District of Alaska, Division No. 1.*

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IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS,

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NICK GURVICH,
Appellant and Plaintiff in Error,

vs.

THE UNITED STATES,
Respondent and Defendant in Error.

## Brief for the United States.

### STATEMENT OF THE FACTS.

The defendant, Nick Gurvich, made formal application to the United States District Judge, M. C. Brown, for license to retail liquor as provided in chapter 4 of the Alaska Code of Criminal Procedure, and a license was granted. Under this license the said Nick Gurvich conducted, as owner, a saloon, known as the Slavonian saloon, retailing intoxicating liquors. He employed two barkeepers to run the saloon bar. Archie Belich and Peter Gilovich are their names. Gurvich himself seldom attended bar at his saloon, and there is no evidence that he personally sold any liquor. At the December term, 1903, of the United States District Court at Juneau, the said Nick Gurvich and his barkeepers, the above-named Archie Belich and Peter Gilovich, were indicted by the Grand Jury for selling liquor to minors, and at jury trials Nick

Gurvich and Archie Belich were found "guilty." The punishment imposed on Gurvich by the Court was a revocation of his license to sell intoxicating liquor. In due time the defendant, Gurvich, by his attorneys, Messrs. Malony and Cobb, made a motion to arrest the judgment, basing the said motion on two grounds, viz.: 1st, that the jury before whom the case was tried, composed of only six men, was an illegal jury, and, 2d, because the penalty of forfeiture of the barroom license provided by section 478 of the Alaska Criminal Code is illegal and forbidden by law. This motion in arrest of judgment the District Court denied, as it did also a motion for a new trial. The defendant thereupon appealed from the judgment of forfeiture of his license, and on this appeal assigns as error:

1st. That it was error for the Court to compel him to go to trial before a jury of six men instead of a jury of twelve men.

2d. That it was error to overrule the defendant's motion in arrest of judgment.

3d. That it was error to refuse defendant's instructions that the unlawful act of the employee was not the unlawful act of the principal, unless the unlawful act of the employee was made by the direction of the defendant, either express or implied, or with his knowledge and consent.

4th. It was error for the Court to instruct the jury that if a man is required by law to refrain from doing a particular act, and furnishes the means to others with which to do that forbidden act, and adopts no adequate means to prevent the forbidden act being done, he may be said to knowingly permit the act.

5th. That the knowledge of the agent was the knowledge of the principal.

The defendant then, in his appeal from the judgment of forfeiture, of his license, raises the following questions:

## THE QUESTIONS INVOLVED.

(a) Where a defendant is charged under the Alaska Criminal Code with a crime which is a misdemeanor, can he be lawfully tried by a jury of six men instead of a jury of twelve men?

(b) Is the knowledge of the unlawfulness and the unlawful act of the agent or employee, the knowledge of the unlawfulness and the unlawful act of the principal or employer?

(c) Is the penalty of forfeiture of a barroom license illegal and forbidden by law when a statute, which sets out the manner and conditions upon which a barroom license shall be granted, provides this forfeiture as a punishment for a violation of such license?

## ARGUMENT AND AUTHORITIES.

"(a)" This same question is now before the Supreme Court of the United States in a case from this district entitled, United States vs. Fred Rasmussen, No. 314.

Carter's Alaska Code of Criminal Procedure, in section 120, which provides for the formation of trial juries in criminal cases, directs as follows:

"The jury shall consist of twelve persons, *unless in trials for misdemeanors the parties shall consent to a less number.* Such consent shall be entered in the journal."

And again in section 171 of Carter's Alaska Code of Civil Procedure, which provides for the formation of trial juries it is directed as follows:

"Provided, That hereafter, in trials for misdemeanors, six persons shall constitute a legal jury."

The laws of Alaska above cited require, then, that all misdemeanors shall be tried by a jury composed of six men. The defendant at bar, through his counsel, has questioned this kind of a jury, alleging it illegal and contending that the statute is unconstitutional. We respectfully submit that the defendant cannot question the constitutionality of a law enacted by the Congress of the United States in this Court. Neither can he ask the Court to pass upon this question which involves the construction and application of the Constitution of the United States. The act of Congress of March 3d, 1891, provides thus:

"Appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts direct to the Supreme Court in the following cases: . . . . *In any case that involves the construction or application of the Constitution of the United States.* In any case in which the constitutionality of any *law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. In any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.*"

26 U. S. Statutes, 827, sec. 5, as amended in 29 U. S. Statutes, 492.

Or if it be contended that the court in which the action at bar was first instituted is not a federal court but a territorial court (a question not necessary here to discuss), we respectfully submit that our contention is still good and that your Honors cannot pass upon this question. It is provided in 23 U. S. Statutes, 355, relating to the jurisdiction of the Supreme Court of the United States, that, "No appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or *in the Supreme Court of any of the territories of the United States,* unless the matter in dispute shall exceed the sum of five thousand dollars. *This section shall not apply to any case* wherein is involved the validity of any patent or copyright, *or in which is drawn in question the validity of any* treaty or *statute of,* or an authority exercised under, *the United States; but in all such cases an appeal or writ of error* may be brought without regard to the sum or value in dispute."

It seems hardly necessary to further enlarge the discussion of this question, as these statutes make it clear that the proper court in which to test the constitutionality of a law of Congress, or *seek to construe or apply the Constitution of the United States,* is the Supreme Court of the United States. Passing to the next question in order, or,

"(b)" *Is the knowledge of the unlawfulness and the unlawful act of the agent or employee the knowledge of the unlawfulness and the unlawful act of the principal or employer?*

The unlawful act of the agent or employee was selling liquor to minors. This act is criminal under the statutes of Alaska regulating the sale of intoxicating liquors. And the general rule of law undoubtedly is, that the principal is not ordinarily liable for the criminal act or acts of his agent committed without his knowledge or consent. But like all general rules, this has its limitations and qualifications. The principal is not always exempt from liability for the criminal acts of his agent, for if the protection of the public safety or health or morals requires that a liability be fastened upon him, then the general rule must be qualified. In theory the State is always an ardent protector of the public health and public morals, especially of the youth. For this purpose its strong arm puts forth a controlling hand into every business, every interest, and with almost arbitrary power it makes every affair of the individual give way in so far as it is necessary to protect its charges, the public safety, the public health, and the public morals. Such is the "Police Power." Under this power Congress has legislated for Alaska upon the subject of intoxicating liquors, and the general rule is as much qualified under this legislation as it is under that of any legislation.

In accordance with this view it is stated, *"There are, however, certain exceptions to the general rule, prominent among which are a class of cases arising under revenue laws and police regulations. . . . . Under this exception have been held to come the cases of sales of intoxicating liquors by clerks or agents."*

1 Ency. of Law, 1161.

Again, in the clear language of an able text-writer the limitations of the general rule, supra, as applied to the subject of intoxicating liquors, is commented on thus:

"There is, however, a class of cases, as has been seen, where by statutory enactment, the doing of a certain act, otherwise perhaps innocent or indifferent, or at the most not criminal, is expressly prohibited under a penalty. Of this class are many of the statutes in the nature of police regulations which impose penalties for their violation, often irrespective of the question of the intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation exceedingly improbable, if not impossible."

Mechem on Agency, sec. 746.

So Judge Cooley of Michigan stated the law, "Many statutes, which are in the nature of police regulations, impose criminal penalties irrespective of any intent to violate them."

People vs. Roby, 52 Mich. 579, 50 Am. Rep. 270.

It is, perhaps, impossible, at the present time to find a jurisdiction of the United States, where there is not some statute enacted with a design of preventing minors from getting and using intoxicating liquors. It is considered that persons of immature age more easily form abnormal appetites than persons of mature years and experience, and so the main object of these statutes is to prevent them from acquiring habits of dissipation that would unfit them for usefulness. As the fond mother watches with

jealous care her child grow and develop, providing in its helpless times for its physical and moral needs, commanding it to do or not to do those things which it should or should not do, that she may one day see the fruit of her efforts a useful creature; so the State, alike jealous of its children, provides for their welfare in a thousand ways; and by just such legislation as we are discussing provides a means, though not always efficient, for crushing the serpent's head and saving to itself useful men and women.

"Some of these statutes merely prohibit the sale of intoxicating liquors to minors; others prohibit either a sale or a gift; while there are others which are even more comprehensive in their scope and prohibit the 'furnishing' of intoxicating liquors to minors."

17 Ency. of Law, 333.

The statutes are thus classified into three distinct classes. The statutes of Alaska are not unlike those of other jurisdictions. After providing the conditions under which a license can be obtained, section 466 of Carter's Alaska Code of Criminal Procedure is as follows:

"That under the license issued in accordance with this act no intoxicating liquors shall be sold, given or in any way disposed of to any minor, Indian or intoxicated person, or to an habitual drunkard."

And section 473 provides a penalty for violating the license thus:

"That any person, having obtained a license under this act, who shall violate any of its provisions, shall, upon con-

viction of such violation, be fined not less than fifty dollars nor more than two hundred dollars, and upon every subsequent conviction of such violation during the year for which such license is issued shall be fined a like amount, and in addition to such fine shall pay a sum equal to twenty-five per centum of the amount of the fine imposed for the offense immediately preceding, and have his license revoked, and in case of nonpayment of the fines and penalties above named shall be imprisoned for a period of time not exceeding six months, or until the same are paid. That after second conviction no license shall thereafter be granted to said party: Provided, that no minor under sixteen years of age shall be allowed to enter any place where liquors are sold other than retail, without the consent of the parent or guardian of such minor."

And it is provided further in section 478 of the same code:

"That no licensee under a barroom license shall employ, or permit to be employed, or allow any female or minor or person convicted of a crime, to sell, give, furnish, or distribute any intoxicating drinks or any admixture thereof, ale, wine, or beer, to any person or persons. And no licensee in any place shall knowingly sell or permit to be sold in his establishment any intoxicating liquor of any kind to any person under the age of twenty-one years, under the penalty, upon due conviction thereof, of forfeiting such license, and no person so forfeiting his license shall again be granted a license for the term of two years."

Of the three classes this Alaska statute is easily one of the most comprehensive class. Its terms are broad

enough to bring it within that class which "prohibits the 'furnishing' of intoxicating liquors to minors."

But how are statutes of this nature construed? We respectfully submit that the answer to this question must necessarily determine the liability of the defendant at bar.

The cases furnish two constructions each opposed to the other. One line of cases hold that the master is not criminally liable for the acts of his servant or agent done in the course of his business and within the scope of the agent's employment unless authorized either expressly or impliedly. The other line of cases hold that the master is criminally liable for the acts of his servant or agent done in the course of his business and within the scope of the agent's employment whether authorized or not.

17 Ency. of Law, 386-7, and cases cited.

The authorities are about evenly divided. But, considering the care with which legislatures have legislated on this subject and the evils they have tried to prevent, the better rule would seem to be the latter. They expressly prohibit the sale, gift, or the furnishing of intoxicating liquors to minors. So if the prohibited act be done by the agent in the course of his employment the principal must respond.

"*This is particularly true in those cases where the principal confides, in a greater or less degree, the conduct and management of his business to his agents.* He selects his own agents and has the power, as well as the duty, to control them; and if by reason of his lack of oversight or their

own carelessness or unfaithfulness, the prohibited act is done, he should be held accountable."

Mechem on Agency, sec. 746.

Section 465 of the Alaska Code of Criminal Procedure requires an applicant for a license to sell intoxicants to file a petition stating among other things:

"Fifth. *That he intends to carry on such business for himself and not as an agent of any other person, and if so licensed he will carry on such for himself and not as the agent of any other person.*

"Sixth. *That he intends to superintend in person the management of the business licensed, and if so licensed he will superintend in person the management of the business so licensed.*"

We especially call your Honor's attention to this last provision, for the facts of the case at bar, as can be seen from the record, show that this statute has been violated.

It is but necessary in the case at bar to refer to the statement of facts, supra, to see that the barkeeper of the defendant run his saloon for him. This alone—doing what he has expressly said in his petition he would not do —renders him liable to the penalty imposed by the statute.

But the two statutory constructions, supra, simply amount to this: in the first class the cases make "intent" an ingredient of the offense; in the second class "intent" is no ingredient of the offense. Under which construction, then, will we place the Alaska statutes, set out supra? The code sets out in detail just the manner of obtaining

the right or license to sell intoxicants; then in section 466 it goes on: *"That under the license in accordance with this act no intoxicating liquors shall be sold, given or in any way disposed of to any minor."* Clearly there can be no "intent" necessary in such unequivocal language. The statute says that *no* liquors shall be sold to minors; if they are the crime is fastened upon the man who is responsible for the license. It is his duty to prevent a violation of the license. The learned Judge in the District Court in his instructions to the jury stated: "That when the barkeepers of the defendant were selling liquor to minors and others, they were selling it under the license that had been granted to the defendant; all sales made in the Slavonian saloon after the license was granted were sales either lawful or otherwise, under said license, *and if made in violation of its terms such act or sale or giving away intoxicants was unlawful and the act of the barkeeper,* the agent, was the act of the principal, and in my opinion under the peculiar language of the statutes of Alaska, the knowledge of the agent or barkeepers was the knowledge of the principal."

Section 478 of the Alaska Code states that "no license in any place shall knowingly sell or permit to be sold," etc. This is even stronger language than section 466, for the defendant is not to *permit* liquor to be sold to minors. It is his duty under the section to see to it that liquor is not sold to minors and if it is, whether by him or not, whether under his direction or not, whether with his knowledge or consent or not, he is still responsible for the selling though done by his agent. It is an abso-

lute command to the licensee to prevent liquor being sold to minors. Again referring to the instructions in the court below, in regard to the nature of knowledge required under the statute affecting the sale or permission to sell to minors:

"Permit is defined by Webster in the following language, 'to let through; to allow or suffer to be done; to tolerate or put up with.' One may permit by giving express authority to another to do a particular act, or he may allow or suffer the act to be done or tolerated, *and may knowingly do so when under obligation of law to prevent the act, and takes no adequate action or means to prevent being done that which the law requires him to prevent.* In other words, *if a man when required by law to refrain from doing a particular act, furnishes the means to others, with which to do that act which is forbidden by law, and having furnished the means and placed it in the power of another to do the act and adopts no adequate means to prevent its being done, he may be said to knowingly permit the act.*"

To both these instructions given by the lower court the defendant excepted and makes them his fourth and fifth errors in his assignment of errors, but we respectfully submit that they state the law and are supported by the authorities.

The defendant asked this instruction:

"Gentlemen of the jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and

consent of the employer, or by the employer's directions, either express or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either express or implied, or with his knowledge and consent, then you will find the defendant not guilty."

At common law the defendant's instructions would perhaps state the law. The rule was: "A master is not responsible criminally for any violation of the liquor laws committed by his clerk, servant or agent, without his knowledge or consent, express or implied, or in his absence and in disregard of his commands or instructions."

Black on Intox. Liq., sec. 368 and cases cited.
Johnson vs. State, 83 Ga. 553, 10 S. E. Rep. 207.

But the statutes of which the Alaska statutes are an example have changed this common-law rule and it is held to be no defense to an indictment against the principal that the unlawful act was done without his knowledge or consent, or without his authority, or in his absence, or even done in contravention of his express and *bona fide* orders.

Black on Intox. Liq., sec. 370 and cases cited.
Carroll vs. State, 63 Md. 551, 3 Atl. 29.

*"The object of these statutory provisions, in effect is to require the principal to see to it, at his peril, that no un-*

*lawful sales are made in his establishment. And if it savors of severity to subject him to punishment for the acts of others which he had expressly forbidden, it must be remembered that he can escape liability by selecting servants and agents who will keep within the law and obey his orders or by abandoning a business which exposes him to such hazard."*

Black on Intox. Liq., sec. 370.

Many analogous cases might be cited to show that an intention to violate the law is *not* an ingredient of offenses of this kind which are offenses under the police power, such as sales of liquor on Sundays, sales to habitual drunkards, etc., etc. In Massachusetts a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating.

Commonwealth vs. Boynton, 2 Allen, 160.

And of the offense of selling adulterated milk, though he was ignorant of its being adulterated.

Com. vs. Farren, 9 Allen, 489.
Com. vs. Holbrook, 10 Allen, 200.
Com. vs. Waite, 11 Allen, 264.

If one's business is the sale of liquors, a sale by his agent in violation of law is prima facie by his authority.

Com. vs. Nichols, 10 Met. 259.

Bound at his peril to see that his license was not violated and providing no adequate and effective means to prevent it, the defendant at bar is responsible criminally

for the criminal acts of his agents in selling liquor to minors—for the purposes of the statutes their knowledge was his knowledge, their act was his act—and he must respond to the punishment provided by the law. What is that punishment? This raises the main question or,

"(c)" *Is the penalty of forfeiture of a barroom license illegal and forbidden by law when a statute which sets out the manner and conditions upon which a barroom license shall be granted, provides this forfeiture as a punishment for a violation of such a license?*

"In a general sense, a license is a permission granted by some competent authority to do an act which, without such permission, would be illegal."

State vs. Hipp, 38 Ohio St. 199, 226.

"The popular understanding of the word 'license' is undoubtedly a permission to do something which, without the license, would not be allowable. This is also the legal meaning."

Youngblood vs. Sexton, 32 Mich. 406, 20 Am. Rep. 654.

"A license is a privilege granted by the State, usually on payment of a valuable consideration, though this is not essential. To constitute a privilege, the grant must confer authority to do something which, without the grant, would be illegal; for if what is to be done under the license is open to everyone without it, the grant would be merely idle and nugatory, conferring no privilege whatever. *But the thing to be done may be something lawful in itself, and only prohibited for the purposes of the li-*

*cense; that is to say, prohibited in order to compel the taking out of a license."*

Cooley on Taxation, 596.

A license involves three leading ideas, according to Mr. Black in section 117 of his work on Intoxicating Liquors:

(a) It confers a special privilege or franchise, upon selected persons, to pursue a calling not open to all.

(b) It legalizes acts, which, if done without its protection, would be offenses.

(c) It is a privilege granted as a part of a system of police regulation.

This last idea distinguishes it from taxation. A tax upon business is primarily for the purpose of raising revenue, although as a secondary object it contemplates the regulation of the business. A license fee is exacted primarily as a means of restricting or regulating a business, although, incidentally, it may produce an addition to the public revenue.

Pleauter vs. State, 11 Neb. 547, 10 N. W. Rep. 481.
State vs. Hipp, 38 Ohio St. 199 (cited supra).

And under a constitutional prohibition against the licensing of the liquor traffic, the legislature still has power to impose taxes upon it.

Black on Intox. Liq., secs. 108 and 179, and cases cited.

*A license is not a contract between the licensing authority and the licensee,* and any laws enacted by lawful authority, modifying its terms, imposing additional bur-

dens or restrictions upon the holder, *or even revoking the privilege, are not open to the constitutional objection of impairing the obligation of a contract.*

Beer Co. vs. Mass., 97 U. S. 25.

La Croix vs. Fairfield Co., 49 Conn. 591, 47 Am. Rep. 648.

Metropolitan Board of Excise vs. Barrie, 34 N. Y. 659.

Black on Intox. Liq., sec. 127, and cases cited.

*A license does not possess the essential elements of a vested right of property.* Hence, it cannot be entitled to the protection of that provision of the Constitution which forbids taking property without due process of law.

La Croix vs. Fairfield Co. Commrs., 50 Conn. 321, 47 A. R. 648.

Martin vs. State, 23 Neb. 371, 36 N. W. Rep. 554.

A statute authorizing the revocation of a license for any violation of the liquor laws does not violate the constitutional right to a jury trial.

17 Ency. of Law, 215, and cases cited.

Voight vs. Excise Commrs., 59 N. J. L. 358.

Neither would such a statute be a violation of the constitutional prohibition against depriving any person of his rights, immunities and privileges.

17 Ency. of Law, 215, and cases cited.

Young vs. Blaisdell, 138 Mass. 344.

A license then is not a tax, it is not a contract, it is not a vested or property right, its revocation would not entitle

a man to a jury trial for a cause of revocation and its revocation would not deprive him unlawfully of any of his rights, immunities or privileges. The constitution does not afford any protection on any one of these grounds. These statutes which provide for a revocation of licenses for violations of the liquor laws are valid and not unconstitutional.

17 Ency. of Law, 215, and cases cited.

Black on Intox. Liq., sec. 51, and cases cited.

Summing up as to just what a license is, it may be answered thus: It is a *mere special privilege or permission* to do that which would, without it, be unlawful.

State vs. Frame, 39 Ohio St. 413.

17 Ency. of Law, p. 230, and cases cited in note.

Being a mere special privilege or permission from a competent authority to a designated person, with what rights is the licensee clothed? All persons cannot be licensees, but only those who show themselves possessed of the requisite qualities which public policy imposes. "It is of the very essence of all license laws (says Mr. Black in section 130) that a principle of selection be applied to the persons who petition for the privilege, and that it be accorded only to those who possess the moral and other qualifications which tend to secure the public against abuses of the right granted." It follows from this that a license is a special privilege to a designated individual. When a person has shown his qualifications and procured a license, *his privilege or permission under it is always impliedly sub-*

*ject to such statutes and laws as are lawfully in existence at the time it is granted, without words in the license expressly referring to such laws.*

Baldwin vs. Smith, 82 Ill. 162.

Black on Intox. Liq., sec. 148, and cases cited.

17 Ency. of Law, p. 236, and cases cited.

And a license to sell liquor for certain purposes therein specified cannot protect the licensee from a criminal prosecution for violating the laws of the State by selling liquors for other purposes than those named in the license.

State vs. Adams, 20 Ia. 486.

"Since the privilege conferred by a license is not general, but special and limited in its nature, *and does not include the right to violate any provision of the positive law, it follows that the license will not protect its holder in making sales to infants . . . . or any other persons to whom the statute expressly forbids the selling or furnishing of liquor.*"

Com. vs. Tabor, 138 Mass. 496.

Black on Intox. Liq., sec. 151.

"And it is no defense to an indictment for selling liquor to such classes of persons that the law prescribing and punishing the offense was not passed until after the defendant's license was issued; *for he took the license, not only subject to such laws as were then in force, but also to such as might be thereafter enacted, regulating the sale of liquor.*"

Com. vs. Seilers, 130 Pa. St. 32, 18 Atl. Rep. 541.
Black on Intox. Liq., sec. 151, cited supra.
State vs. Fairfield, 37 Me. 517.

It would not be seriously contended that a man could be licensed to do that which was unlawful. All persons must obey the laws and no license will give them any exemption from such obedience. A licensee is clothed with just such rights as the law allows him under the license. But when a person is given a permission or license to do an act, which would otherwise be unlawful, and violates any provision of the laws, he, at once, renders himself amenable to punishment. In this respect, he stands in no better position than any other subject. There are various kinds of punishments and the liquor laws specifically set out what the punishments for their violations shall be. It is usually a revocation of the license, sometimes a fine, and sometimes both, and as all of the liquor laws are statutory, the punishment for any one jurisdiction must be sought in its statutes. In Alaska, where the defendant at bar chose to sell liquors, the statute reads thus:

"That no licensee under a barroom license shall employ or permit to be employed, or allow any female or minor or person convicted of crime, to sell, give, furnish, or distribute any intoxicating drinks or any admixture thereof, ale, wine or beer to any person or persons. And no licensee in any place shall knowingly sell or permit to be sold in this establishment any intoxicating liquor of any kind to any person under the age of twenty-one years,

under *the penalty, upon due conviction thereof, of forfeiting such license,* and no person so forfeiting his license shall again be granted a license for the term of two years."

Carter's Code of Crim. Proc. for Alaska, sec. 478.

This law was in existence before he applied for or obtained his license. A license was granted to him subject to this law. In the few years past and especially within the last year or two, there has been a vigorous prosecution in this district against violators of the liquor laws, and the worthy Federal Judge here has often severely censured in his charges to juries these culprits, so that this law as well as others in regard to liquor selling must have been forcibly brought home to the defendant at bar, thus rendering his guilt in this case all the more inexcusable. This statute of Alaska is not unlike that of other jurisdictions. It provides the penalty of a forfeiture of the license for selling liquor to minors. Such statutes have been held constitutional by a multitude of authorities, the leading of which have been set out supra. There is a line of authorities which hold that a revocation of a license is not a punishment but a withdrawal of a privilege.

17 Ency. of Law, p. 267.

And perhaps this is the better way to view it, as the legislature simply grants the privilege on condition that no law will be violated. But whether a forfeiture of a license for a violation of the liquor laws is a punishment or the withdrawal of a privilege, this is clear—*the licensing authority can always revoke a license for a violation of the liquor laws.*

"The authority which granted a license *always* retains the power to revoke it, either for due cause of forfeiture, or upon a change of policy and legislation in regard to the liquor traffic."

Black on Intox. Liq., sec. 189, and cases cited.

Any violation of the liquor laws is sufficient ground of revocation;

17 Ency. of Law, 264, and cases cited;

and selling liquor to minors is a sufficient violation;

17 Ency. of Law, 265, and cases cited;

State vs. Horton, 21 Or. 83, 27 Pac. Rep. 165;

and it is no defense that the licensee has been convicted and punished in a criminal proceeding for the acts which constitute the grounds of revocation, for the licensee might pay his fine and go on in his illegal traffic, and might well afford to do so, making money out of the operation.

Davis vs. Com., 75 Va. 947.

Cherry vs. Com., 78 Va. 375.

17 Ency. of Law, 264.

The statutes of the various jurisdictions relating to forfeitures of licenses may be classified into three general classes:

(1) Unless a statute provides that proceedings shall be instituted to revoke a license after a violation is proved, a conviction of violating the liquor laws, ipso facto, renders the license void and it can no longer afford the licensee any justification or protection.

17 Ency. of Law, 264, and cases cited.

(2) Another line of statutes states that on conviction of the licensee of a violation of the liquor laws, the Court renders a judgment declaring the license forfeited as a consequence of conviction.

17 Ency. of Law, 266, and cases cited.

(3) Still another line of statutes states that formal proceedings are necessary to revoke a license for good cause shown.

17 Ency. of Law, 267, and cases cited.

Whether the Alaskan statute belongs to the first or the second of the classes above, it is not necessary to determine. The record of the case at bar shows that the defendant was convicted by a jury of selling liquor to minors—violating the liquor laws, and under section 478, supra, the penalty for such illegal act is the forfeiture of his license. This penalty has been imposed by the District Court. It is certain that the Alaskan statute does not belong to the third class, for no formal proceedings are necessary to revoke a license for good cause shown. *And only in this third class the authorities hold that the action of a tribunal revoking a license is reviewable because the licensing board and judge must be a party to the proceedings, which it or he is not in the first and second classes of statutes.*

17 Ency. of Law, 26, and cases cited.

People vs. Forbes, 52 Hun, 30.

Com. vs. Wall, 145 Mass. 216, 13 N. E. Rep. 486.

It follows that as the Alaskan statute is not of this third class the judgment under it revoking the defendant's license is not reviewable. But since your Honors have seen fit to grant a supersedeas, we have not argued this view and merely mention it in this place to present in a stronger light our contentions above.

Section 466 of the Alaska Code of Criminal Procedure reads as follows:

"That under the license issued in accordance with this act no intoxicating liquors shall be sold, given or in any way disposed of to any minor, Indian or intoxicated person, or to an habitual drunkard."

No penalty is attached to this statute.

Section 473 of the Alaska Code of Criminal Procedure reads as follows:

"That any person, having obtained a license under this act, who shall violate any of its provisions, shall, upon conviction of such violation, be fined not less than fifty dollars nor more than two hundred dollars, and upon every subsequent conviction of such violation during the year for which such license is issued shall be fined a like amount, and in addition to such fine shall pay a sum equal to twenty-five per centum of the amount of the fine imposed for the offense immediately preceding, and have his license revoked, and in case of nonpayment of the fines and penalties above named shall be imprisoned for a period of time not exceeding six months, or till the same are paid. That after second conviction no license shall thereafter be granted to said party: Provided, that no

minor under sixteen years of age shall be allowed to enter any place where liquors are sold other than retail, without the consent of the parent or guardian of such minor."

Perhaps a sale of liquor to minors under this section would be a sufficient violation of the provisions of the license, yet it does not in express terms apply to such a case. While section 478 of the same code, set out, supra, in this brief, provides a penalty for the sale of liquor to minors. These three sections constitute the law in Alaska in regard to the sale of liquor to minors. Reading them together, the legislative intent is clear that such a sale is a crime and punishable, and as section 478 provides a punishment for this express case, it is the only punishment which can be inflicted for the crime of selling liquor to minors.

Summing up, we respectfully submit that the law abundantly supports the following propositions:

(a) The question of the legality of a trial for a misdemeanor by a jury of six men raises a constitutional question and is only to be passed upon in the Supreme Court of the United States.

(b) The defendant at bar after he obtained his license was bound at his peril, under the statutes of Alaska, to see that it was not violated.

(c) The defendant at bar, having furnished the means of running a saloon business to barkeepers and allowed them to conduct it for him, in his absence, was bound to see that they did not violate the law.

(d) The barkeepers of the defendant having violated the law by selling liquor to minors while in his employment, and acting in the course of that employment, their unlawful act was his unlawful act, their guilty knowledge was his guilty knowledge.

(e) The wording of the Alaskan statute, cited supra, is *"and no licensee shall permit to be sold in his establishment any intoxicating liquor* of any kind to any person under the age of twenty-one years," making the defendant bound at his peril to obey this law. There is no alternative.

(f) Having thus violated the law he is amenable to its penalty. This penalty consists of a forfeiture of his license. Such a statute has been held constitutional and valid.

(g) That under the exercise of the police power the licensing authority has a valid right to revoke a license and take away the privilege when a license violates the law, for the privilege is impliedly granted only on condition that the licensee will not violate the law.

And lastly, if this defendant can sell liquor to the minors of this frontier district, where law and order are hard to enforce, where the officers of the government have long coped, with little success, against crime of all classes, because such a class of men as this defendant utterly disregard the sacred rights of morality and decency to gain unto themselves the dollar, and escape the penalty which the wisdom of the law-making body has written into the statute, then he and others of the same ilk can and will

continue to corrupt our youth, invade the sanctity of our homes and blight the coming generations with the poison which has cursed a thousand times ere this, that they might enrich their pockets.

Owing to the distance from San Francisco and the means of communication from this place, which is only by steamboat, we would not have had time to wait for the appellant's brief, write a reply, have it printed and filed, within the time limited by the rules of the court. And as this brief is intended to be a reply to the appellant's brief without having first seen this brief, it is perhaps of greater length and more extensive than it would otherwise be. But we trust that these inconveniences of communication under which Alaskans live have not caused us to unnecessarily burden the minds of the Court.

So we respectfully and confidently submit that the judgment of the lower court should be affirmed.

JOHN J. BOYCE,

United States Attorney for the District of Alaska, Division No. 1.